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IN THE

Supreme Court of the United States

No. ~~835~~. 27 October Term, 1928.

JOSEPH H. BROMLEY,
Appellant,
(Plaintiff Below),

v.

BLAKELY D. McCAUGHN, Collector of Internal Revenue for the First District of Pennsylvania,
Appellee,
(Defendant Below).

On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR APPELLANT.

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On Certificate from the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR APPELLANT.

I.

OPINIONS BELOW.

The opinion in the District Court is reported in 26 Fed. 2d, 380 (1928).

There was no opinion in the Circuit Court of Appeals.

II.

JURISDICTION.

1. This court has jurisdiction to answer questions certified by the Circuit Court of Appeals under United States Code, Title 28, Sec. 346.

2. The date of the judgment of the District Court is May 23, 1928. The Circuit Court of Appeals certified to this Court the questions set out, *infra*, p. 3.

III.

STATEMENT OF THE CASE.

In March, 1926, Joseph H. Bromley, appellant, then and theretofore a resident of the United States, filed with the Collector of Internal Revenue for the First District of Pennsylvania, a return of his income for tax purposes, disclosing gifts made during the calendar year 1925 amounting to $568,300, on which, under protest, he paid a tax of $20,598, assessed pursuant to the provisions of the Revenue Act of 1924. After the Commissioner of Internal Revenue had denied his claim for refund of the tax so paid, Bromley brought this action in the District Court of the United States for the Eastern District of Pennsylvania against the Collector, for the amount of the tax paid and interest.

The action is one to recover a tax upon transfers by gift, levied and collected under the provisions of Sections 319-324, inclusive, of the Revenue Act of 1924, approved June 2, 1924 (43 Stat. 253, 313), as amended by Section 324 of the Revenue Act of 1926 approved February 26, 1926 (44 Stat. 9, 86). The pertinent provisions, as amended, read as follows:

> "(a) Section 319. For the calendar year 1924 and the calendar year 1925, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, . . .
>
> "(b) Sub-division (a) of this section shall take effect as of June 2, 1924."

The cause was heard by the District Court sur statutory demurrer in the nature of a case stated, showing that the transfers by gift were all inter vivos; were made after

the enactment of the Revenue Act first cited; and were not made in contemplation of death. The parties stipulated that judgment should be entered for the plaintiff or defendant according as the applicable provisions of the taxing act should be found invalid or valid.

The learned District Court held that the provisions of the Revenue Act under which the tax was collected were not unconstitutional, and entered judgment for the defendant. The plaintiff appealed to the Circuit Court of Appeals for the Third Circuit. That Court has certified to this Court two questions as follows:

1. Are the provisions of Sections 319-324 of the Revenue Act of 1924, as amended by Section 324 of the Revenue Act of 1926, when applied to transfers of property by gift inter vivos, made after the effective dates of the cited Revenue Acts and not made in contemplation of death, invalid, because they violate (a) the third clause of Section 2 and (b) the fourth clause of Section 9 of Article I of the Constitution of the United States in that the tax they impose is a direct tax and has not been apportioned?

2. Are the cited provisions, when applied to transfers of property made in like circumstances, invalid because they violate (a) the Fifth Amendment of the Constitution and (b) the first clause of Section 8 of Article I of the Constitution in that they impose a tax which is graduated and subject to exemption and, therefore, lacks uniformity, and also deprive a person of his property without due process of law?

IV.

THE ACTS AND THE CONSTITUTIONAL PROVISIONS.

1. The Act is as follows:

Revenue Act of 1924, Section 319, 43 Stat. 313:

"For the calendar year 1924 and each calendar year thereafter a tax equal to the sum of the following is hereby

imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly:

1 per centum of the amount of the taxable gifts not in excess of $50,000.;

2 per centum of the amount by which the taxable gifts exceed $50,000. and do not exceed $100,000.;

3 per centum of the amount by which the taxable gifts exceed $100,000. and do not exceed $150,000.;

4 per centum of the amount by which the taxable gifts exceed $150,000. and do not exceed $250,000.;

6 per centum of the amount by which the taxable gifts exceed $250,000. and do not exceed $450,000.;

9 per centum of the amount by which the taxable gifts exceed $450,000. and do not exceed $750,000.;

12 per centum of the amount by which the taxable gifts exceed $750,000. and do not exceed $1,000,000.;

15 per centum of the amount by which the taxable gifts exceed $1,000,000. and do not exceed $1,500,000.;

18 per centum of the amount by which the taxable gifts exceed $1,500,000. and do not exceed $2,000,000.;

21 per centum of the amount by which the taxable gifts exceed $2,000,000. and do not exceed $3,000,000.;

24 per centum of the amount by which the taxable gifts exceed $3,000,000. and do not exceed $4,000,000.;

27 per centum of the amount by which the taxable gifts exceed $4,000,000. and do not exceed $5,000,000.;

30 per centum of the amount by which the taxable gifts exceed $5,000,000. and do not exceed $8,000,000.;

35 per centum of the amount by which the taxable gifts exceed $8,000,000. and do not exceed $10,000,000.;

40 per centum of the amount by which the taxable gifts exceed $10,000,000."

Section 321:

"In computing the amount of the gifts subject to the tax imposed by section 319, there shall be allowed as deductions:

(a) In the case of a resident—

(1) An exemption of $50,000.;

(2) The amount of all gifts or contributions made within the calendar year to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or fraternal society, order, or association, operating under the lodge system, but only if such gifts or contributions are to be used by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the vocational rehabilitation Act;

(3) Gifts the aggregate amount of which to any one person does not exceed $500.;

(4) An amount equal to the value of any property transferred by gift within the calendar year, which can be identified (a) as having been received by the donor within five years prior to the time of his making such gift, either from another person by gift or from a decedent by gift, bequest, devise, or inheritance, or (b) as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior Act of Congress was paid by or on behalf of the donor or the estate of such decedent, as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such decedent, and only to the extent that the value of such property is included in the total amount of gifts made within the calendar year and not deducted under paragraph (2) or (3) of this subdivision.

(b) In the case of a nonresident—

(1) The amount of all gifts or contributions made within the calendar year to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any domestic corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or fraternal society, order or association, operating under the lodge system, but only if such gifts or contributions are to be used within the United States by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and the amount

of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(2) Gifts the aggregate amount of which to any one person does not exceed $500.;

* * * * * * *"

Section 323. "Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the Collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivisions (a) and in paragraph (2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and that of the consideration received by him, both as of the date of such sale or exchange."

Section 324. "The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected and paid in the same manner and subject, in so far as applicable, to the same provisions of law as the tax imposed by section 301."

Section 319 of the Revenue Act of 1924, 43 Stat. 313, was amended by the Revenue Act of 1926, 44 Stat. 86, so as to reduce the rate of taxation in the higher brackets, the highest tax being 25 per centum on taxable gifts in excess of $10,000,000, instead of 40 per centum in such bracket.

2. The Constitutional Provisions.

The Constitution, Article I, Sec. 2, Cl. 3, provides:

"Representatives and direct taxes shall be apportioned among the several States . . . according to their respective numbers."

Clause 4 of Sec. 9 of Article I is as follows:

"No capitation, or other direct tax, shall be laid, unless in proportion to the Census or enumeration hereinbefore directed to be taken."

Clause 1 of Section VIII, Article I, provides:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

Amendment V provides:

"No person . . . shall be deprived of life, liberty, or property, without due process of law."

V.

SUMMARY OF ARGUMENT.

A. The Gift Tax is a Direct Tax and hence void because unapportioned.

1. If direct, the Gift Tax is void because unapportioned.

2. Indirect taxes are of three kinds only. The Gift Tax falls into none of these categories and is therefore direct.

3. The Tax is a tax upon an essential incident of property and is therefore direct.

B. The Gift Tax is not a uniform tax and is therefore void.

VI.

ARGUMENT.

Preliminary Statement.

The Act in question was approved by President Coolidge with reluctance. He said:

> "A Gift Tax is a further invasion of the rights of the citizen both unusual in nature and of doubtful legality."

The tax has since been repealed (Revenue Act of February 26th, 1926). The Act is not retroactive:

> Blodgett v. Holden 273 U. S. 142 (1926);
> Untermyer v. Anderson 276 U. S. 440 (1927).

The tax is unique in this country and rare elsewhere. In Mexico, for example, the rate is a uniform 10 per cent. But here the tax is graduated, the rates being the same as the then current inheritance tax rates, i. e., 1 per cent. on $50,000, up to 40 per cent. on amounts of $10,000,000 and upwards. Gifts of less than $500 each to one person are not taxed. There are certain discriminations between residents and non-residents.

There are attributes of property so fundamental and so inseparably a part of property that a tax on these property rights is a tax on property itself; otherwise the mandate against direct taxes would be illusory.

A tax upon the income of property is a tax upon property. Income Tax Cases 158 U. S., 630 (1895); Pollock v. Farmers' L. & T. Co., 157 U. S., 570 (1895); 158 U. S., 601 (1895).

This is because, when property does produce income, the product in substance and common sense so partakes of the nature of the producing property that a tax on the income is a tax on the property producing the income. In the *Income Tax Cases* this Court were unanimously of the opinion that the tax upon the interest of municipal bonds

was a tax upon the bond and, therefore, invalid: 158 U. S., 630 (1895). The dissenting Justices held that neither rents of real estate nor income of personal property were direct taxes. The majority held that taxes upon rents of real estate were taxes upon the real estate, and taxes upon the income of personal property were taxes upon the personal property, and hence direct. The taxes were direct taxes because they were taxes upon property.

A fortiori, a tax upon a gift is a tax upon property. Property may exist without income, *but one does not own property unless one can give it away.* The final test of absolute ownership, the supreme exercise of the power of dominion over property, is the gratuitous disposition of property. Here a father was taxed because he chose to give $150,000 each to his four sons, not, however, in contemplation of death. If he had kept his property any tax on the income therefrom would have been a direct tax.

I. The Gift Tax Is a Direct Tax, and Hence Void Because Unapportioned.

1. *If the Gift Tax is direct, it is void.*

The Constitution twice provides that direct taxes must be apportioned:

Art. I, Sec. 2, Cl. 3.
Art. I, Sec. 9, Cl. 4.

The latter clause provides:

> "No capitation, or other direct tax shall be laid, unless in proportion to the Census or Enumeration hereinbefore directed to be taken."

It should be noted that the words "or ~~any~~ other direct" (in Art. I, Sec. 9, Cl. 4, supra) did not appear in the first draft of the Constitution, but were inserted so as to make it clear that Congress had no power to lay direct taxes without apportionment: *Constitution of the United States of America,*

Annotated, page 255 (a Senate Document printed in consequence of Senate Resolution No. 151, dated December 7, 1921).

But a tax upon income is a direct tax (*Pollock* v. *Farmers' Loan & Trust Co., supra*) permitted only because the Sixteenth Amendment removed the prohibition against the levying of that particular tax:

Eisner v. Macomber, 252 U. S., 189, 219 (1921).

That the Gift Tax is not an Income Tax (it is payable by the donor), and is not apportioned is so obvious as not to require argument.

It is, therefore, unconstitutional unless it be indirect.

2. *Making a gift is a right, not a privilege.*

Whether one regards "property" as the sum of the legal rights of the owner in respect to the object; or whether one regards the rights incident to ownership of property as necessarily flowing from the nature of the legal concept of "property" — in either case the faculty of making a gift is one of the rights of the owner of property.

Blackstone says (1 Wend. Blackstone's Commentaries, Chap. 1, p. 138):

> "The third absolute right inherent in every Englishman is that of *property,* which consists in the *free use, enjoyment and disposal of all his acquisitions,* without any control or diminution, save only by the laws of the land . . . " (Italics ours.)

It was said in

Todd v. Wick Bros., 36 Ohio State 370, 385 (1881),

> "In a strict legal sense, property, whether the term is applied to things animate or inanimate, consists in the right to their *use, enjoyment, and disposition.*" (Italics ours.)

In

The Chicago & Western Indiana R. R. Co. v. The Englewood Connecting Rwy. Co., 115 Ill. Rep. 375, 385 (1886),

the Court said:

". . . for property itself, in a legal sense, is nothing more than the exclusive right 'of possessing, enjoying and disposing of a thing,' which, of course, includes the use of a thing."

The Court said in

Jaynes v. Omaha Street R. Co., 53 Neb. 631, 653 (1898)

". . . 'Property' in its appropriate sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects and generally to the exclusion of all others and *doubtless this is substantially the sense in which the word is used in the constitution* as to the taking or damaging of private property for the public use."

The Court held in

Smith v. Campbell, 10 N. C. 595, 597 (1825),

"Property is a thing over which a man may have dominion and power to do with it as he pleases, so that he violates not the law. *He may give, grant, or sell it at his pleasure.*" (Italics ours.)

In

Eaton v. B. C. & M. R. R., 51 N. H. 504, 511 (1872),

the Court said:

"The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right . . . over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.'"

It will be noted that in all these definitions of property the *right of disposition* is stated to be an essential element thereof.

Sometimes the courts refer to these rights of possession, use, enjoyment and disposition as essential attributes or incidents of property. Whether it is said such a right is an essential element, or attribute, or incident, the meaning is the same. Such a right is inherent in and is a constituent part of property. If such right be taken or destroyed, it is property which is taken and destroyed, and this the courts have uniformly held.

This Court said in

Buchanan v. Warley, 245 U. S., 60 (1917),

". . . Property is more than the mere thing which a person owns. It is elementary that it includes the right to *acquire, use, and dispose* of it. *The Constitution protects these essential attributes of property.*" (Italics ours.)

Of course the whole is the sum of *all* its parts; and if the Constitution protects property, it protects each of the incidents thereof. This leads naturally to

3. *The Gift Tax, since it is a tax upon an essential right inherent in property, is a tax upon property, and is therefore direct.*

(a) A tax upon property is a direct tax.

(b) A tax upon an essential incident or attribute of property is a tax upon property, and hence direct. A tax upon an inseparable incident of property, such as the right to give, is a tax upon property, just as a tax upon the income of property is a tax upon property.

A tax upon property, as slaves, is a direct tax:

Springer v. *U. S.*, 102 U. S., 586 (1880).

Even if the tax be only upon the income from property, still it is a tax upon property:

Pollock v. *Farmers' Loan & Trust Co., supra.*

This is because the product of property in substance and common sense so partakes of the nature of the producing property that a tax upon the income is a tax upon the property producing the income.

So a tax upon liquor is a tax upon property, even though the tax be disguised as an excise tax upon the "business" of withdrawing liquor from warehouses:

Dawson v. *Kentucky Distilleries Co.*, 255 U. S., 288 (1921).

This Court said:

"To levy a tax by reason of ownership of property is to tax the property. Compare *Thompson* v. *Kreutzer*, 112 Mississippi, 165; *Thompson* v. *McLeod*, 112 Mississippi, 383. It cannot be made an occupation or license tax by calling it so. See *Flint* v. *Minneapolis Syndicate*, 220 U. S. 187; *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U. S., 28."

In the case of *Thompson* v. *Kreutzer*, 112 Miss. 165 (1916), cited supra, an annual privilege tax or occupation fee upon each person pursuing the business of buying, owning or holding more than 1000 acres of land was held to be a tax upon property and hence unconstitutional. The Court said (p. 167):

> "Ownership is not a privilege conferred by Government, but is one of the rights which Governments were organized to protect . . .
>
> "A tax on a thing is a tax on all its essential attributes, and a tax on an essential attribute of a thing is a tax on the thing itself . . . Consequently, no tax can be imposed on the right of ownership, which is not also a tax on property."

This Court said in

Buchanan v. *Warley*, 245 U. S., 60 (1917),

". . . Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property."

Is it not true, as stated in

People v. *Otis*, 90 N. Y., 48, 52 (1882),

that

"Depriving an owner of property of one of its essential attributes is depriving him of his property"?

The right of gift is an essential element of property. It inheres in the disposal of property. The right to use and to enjoy one's property comprehends the right of gift. The right of gift is part and parcel of all the other elements of property, and is one of the most deeply rooted.

It follows that a tax on the right to give one's property away (an essential attribute of all property) is a tax on property and, therefore, a direct tax.

4. *The argument that unless all the incidents of property are taxed, the tax is not direct, is unsound.*

The Government argued below that a tax is not a tax on property unless it is a tax on *all* the essential incidents of property:

"There are many useful things which one may do with his property besides giving it away"!

That argument is clearly unsound; it is opposed to the principle of the *Pollock* case and the *Dawson* case, that a tax upon *any one* of the essential incidents of property is a tax upon property.

It cannot be denied that the right to give away one's own property is one of those incidents.

If a tax may be laid on one essential attribute of property because that attribute is not the only one, then there is no limit worthy the name to the power to tax property. Idle property may be taxed because it is idle. One's own home may be taxed because one is living in it. That is not an exclusive use of property. Property may be rented to some one else, and if rented would produce additional income and additional income tax.

Lands planted to certain crops may be taxed—because there are "other useful purposes" to which the land could be put.

To receive income from property is not the sole use to which property can be put. Yet a tax on income from property is a tax on property itself.

A person who invests in any sort of property which brings in no immediate income—any person who buys for the "long pull" and is satisfied with a meagre return meanwhile—might be taxed on such an investment. Such a tax does not interfere with the only uses of which the money is capable; there are many uses for money besides investing it in non-dividend-paying securities or in unproductive land. And such investments are an evasion of tax, because if the investments were made in interest-bearing securities the Government would receive additional income tax.

A person with large earning power might invest his entire assets in a large estate occupied by himself from which there is no income. In Great Britain such "evasions" are impossible, because one must pay "income tax" on the fair value of one's home, owned and occupied by one's self. But the Sixteenth Amendment permitted taxes on actual "income" only, not on income which might be earned if one chose to handle one's property differently.

Is it not clear that the test that there are other "useful things which one may do with one's property" is unsound?

If the remunerative *business* use of property—putting money out at interest—owning and receiving the interest on securities; receiving the rental from property—could not

be taxed except for the XVI Amendment, because that would be to tax the property itself, *a fortiori* a non-business, non-remunerative, purely social use of property, that is, the exercise of the primitive right to give it away, may not be taxed, for that would be to tax the property itself.

The case of Anderson v. McNeir, 16 Fed. (2d) 970 (1927) (Manton, *J.*) (reversing the Court below) may be said to have gone the limit in the effort to support the gift tax as a legislative device to prevent the rich from making gifts during their lifetime and thereby "evading the death duties on their estates."*

But the same act elsewhere taxes transfers made "in contemplation of death" irrespective of time—a contrary presumption being raised by two years' duration—and this would seem to be as far as, if not further than Congress may go in its zeal to tax estates. As well tax extravagance, or living expenses over $5000 a year, or college educations; all of these may diminish the estate which the Federal Government taxes. Graduated taxes on gifts to wives and children or friends—graduated taxes on purely social acts of generosity—graduated taxes aimed solely at the rich—it would have been difficult to predict that any Congress would go to such lengths.

In a nut-shell, Judge Manton's reasoning is:

(a) that in the case of a gift there is an "event" which is excisable;

(b) that excises relate to the exercise of rights of property; and

(c) that the gift tax is not a tax on property, because the right to give does not exhaust "those interests which together constitute the right of property so as to amount to the taking of the property" or make it "impossible to use it at all without incurring the tax."

*Note: Since reversed by stipulation on the authority of *Blodgett* v. *Holden*, *supra*.

As to (a): Aside from inheritance taxes, excisable "events" are business transactions. Historically, the State has always claimed dominion over the property of dead persons. It has never attempted to forbid, regulate, or tax generous impulses. This is the first time in which there is even color for the assertion that the Government has attempted to single out isolated social transactions, and visit such transactions with liability to a tax on the "privilege" of making same.

"The happening of an event," Manton, *J.*, says justified the tax. Surely there are "events" taxes on which should be so arbitrary and absurd as to be beyond the power of Congress: marriages, births, as well as gifts in recognition thereof, would seem to be so local and personal—like looking out of one's window—as not to be excisable. A dinner may be an "event," so may any other social function. Is it excisable, and if not, why not? A social promise is said not to be a contract; is it an "event" which is excisable?

As to (b): There is no case applicable in principle sustaining as an excise the exercise of so inherent, indispensable and ordinary an attribute of property as the voluntary and free disposition thereof.

As to (c): In other words, Judge Manton's thesis is that there cannot be a taking of property unless the property is taken *in toto;* that a tax on an ordinary user of an indispensable attribute of property is not a tax on property unless it excludes every other user. The position is wholly untenable. There *can* be a "taking" without taking the fee. Any serious diminution of the enjoyment of property is a "taking":

> *Portsmouth Harbor Land & Hotel Co.* v. *U. S.*, 260 U. S. 327 (1922);
> *Peabody* v. *U. S.*, 231 U. S. 531, 538 (1913).

> "Depriving an owner of property of one of its essential attributes, is depriving him of his property."
> *People* v. *Otis, supra.*

Likewise, there can be a taxing of property without a taxing of all the attributes of property, or excluding every other possible user. A tax on the rentals of property is a tax on "user." The owner may occupy the property, or permit it to lie fallow and gain the unearned increment —as in the Distilleries Company case [255 U. S. 288 (1920)], the owner of the whiskey might have allowed his whiskey to remain in the warehouse. A tax on the use of land for raising hops or grapes—or rye—would not preclude all other uses of the property, yet it would be a tax on property.

Is not "keeping" a use—the right to decide not to spend, or invest, or give away? Is it excisable? Surely an attempted Federal experiment to bring in a socialistic state by graduated taxes on the idle riches of the idle rich would have to be apportioned. Yet, according to defendant, such a tax would be valid, because one might spend, or invest, or give away.

One may spend, trade, hoard or give: All these may be regarded as "uses." One may keep, or part with by spending, or by investing or giving.

The owner of whiskey has a right to hoard it. That might be one use; but he may not be taxed by a State on the "business" of withdrawing it:

Dawson v. *Kentucky Distilleries Co., supra.*

Investing is a use. Could there be a graduated excise tax on investing? Spending is a use. Could there be a graduated excise tax on spending? Land lying fallow may be said to be "used." Could there be a valid "excise" (a la Henry George) tax on unused land?

The Government argued below that the tax is saved because it does not include *all* gifts; it exempts, forsooth, gifts to charity. Hence it is not a tax upon property because it does not deprive one altogether of the use of property. One may give it to charity! One may give $1,000,000 to charity, but may not give $100,000 to one's wife or

son. Charity may not begin at home. But because of the gracious exemption of public charities, the obvious interference with, and imposition upon, an inseparable incident of property is validated.

5. *Indirect taxes are of three kinds only. The Gift Tax falls into none of these categories, and is therefore direct.*

Courts have rarely attempted to define direct or indirect taxes, but have preferred to decide in each case as it arose, as witness Chief Justice Fuller in

> Thomas v. United States, 192 U. S. 363, 370 (1904),
>
> "There is no occasion to attempt to confine the words 'duties, imposts and excises' to the limits of the precise definition. We think they are used comprehensively to cover customs and excise duties imposed upon importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, occupations and the like."

It is submitted that the true rule is that the *nature of the tax depends upon the nature of the thing taxed.* If the tax is a tax upon a person or upon property it is a *direct* tax; if on a privilege it is an *excise* and is *indirect.*

The Government contends that the tax "is not a direct tax growing out of the general ownership of property, but is a tax on the transfer of property by gift. The tax is, therefore, an excise and as such must meet only the Constitutional requirement of uniformity."

It is submitted that indirect taxes can be divided into three classes:

(a) Inheritance taxes (including inheritance taxes proper, legacy taxes, and estate taxes);

(b) Privilege or business taxes; and

(c) Taxes upon articles of luxury.

(a) Inheritance taxes as above defined are indirect taxes because, as this Court has said in

New York Trust Co. v. Eisner, 256 U. S. 345 (1920),

"This kind of tax always has been recorded as the antithesis of a direct tax; 'has ever been treated as a duty or excise, because of the particular occasion which gave rise to its levy.' 178 U. S. 81-83. Upon this point a page of history is worth a volume of logic."

(These historical considerations are inapplicable to a gift tax. There is no natural right to transmit one's property by will, or otherwise, at one's death, or to receive a legacy or a devise. The inheritance tax itself was a war-time invasion of a customary domain of State taxation and has resulted in complications followed by numerous changes in the law, so that now 80 per cent. of the Federal Inheritance Tax is in effect released to the States. Act of June 2, 1924, c. 234, Sec. 301 (b), 43 Stat. 303; Act of Feb. 26, 1926, c. 27, Sec. 301 (b), 44 Stat. 70.)

(b) Business taxes. The following taxes fall under the category of privilege or business taxes:

(a) On the privilege of engaging in the insurance business (measured by gross receipts):

Pacific Insurance Co. v. Soule, 7 Wallace 433 (1868).

(b) On the privilege of a State bank to issue bank notes for use as currency:

Veazie Bank v. Fenno, 8 Wallace 523 (1869).

(c) On the privilege of doing business at "exchanges" a war tax:

Nicol v. Ames, 173 U. S. 509 (1899).

(d) On the privilege of selling "calls" for stock:

Treat v. White, 181 U. S. 264 (1901).

(e) On the privilege of selling tobacco:

Patton v. Brady, 184 U. S. 608 (1902).

(f) On the privilege of disposing of property in the form of certificates (of stock):

Thomas v. U. S., 192 U. S. 363 (1904).

(g) On the privilege of engaging in the sugar refining business:

Spreckles Sugar Ref. Co. v. McClain, 192 U. S. 395 (1904).

(h) On the privilege of engaging in the business of making oleomargarine:

McCray v. U. S., 195 U. S. 27 (1904).

(i) On the privilege of doing business in the form of a corporation:

Flint v. Stone Tracy Co., 220 U. S. 107 (1911).

The above are all business taxes. They seem to have been held to be indirect for three reasons: (1) because most of them were technically taxes on some activity which the Government might well have had the power to regulate under some conferred power other than the power to tax; (2) because technically the tax need not be assumed, since doing the act taxed was a matter of the volition of the person concerned; and (3) on the ground that the tax could be shifted to the ultimate consumer, who thus paid the tax indirectly in the form of an increased price for some article of consumption.

(c) Luxury taxes.

The following taxes upon articles of luxury have been held to be indirect, partly on historical grounds and partly on the psychological ground that articles of luxury are a good mark for taxation:

(a) taxes on tobacco, liquors, etc.:

Patton v. Brady, 184 U. S. 608 (1902).

(b) taxes on foods:

McCray v. U. S., 195 U. S. 27 (1904).

(c) a tax upon the use of foreign-built yachts:

Billings v. U. S., 232 U. S. 261 (1914).

(d) a tax upon carriages:

Hylton v. U. S., 3 Dallas 171 (1796).

It is obvious that the things taxed in all these cases are *privileges,* since from time immemorial business has existed only on sufferance of the crown and has been subject to business regulation and interference.

It is impossible too strongly to emphasize the fact that indirect taxes are essentially *business* taxes. Except for inheritance taxes and an isolated instance or two of luxury taxes, every kind of indirect tax is connected in some way with some matter of business as that word is commonly understood, from the simple transaction of a sale of real estate to the most complicated form of occupation tax. The business element is ever present.

It is obvious that the gift tax is not in any sense a *business tax.* The making of a gift is not a *business transaction.* It requires no medium of exchange. It has none of the incidents of barter. Indeed the idea of making gifts negatives at once any element of business: the two terms are mutually inconsistent and irreconcilable. Of course it is not an inheritance tax.

It has been shown that indirect taxes fall into the two classes of inheritance and business taxes; that the gift tax is in neither class; and that *all indirect taxes are taxes on privileges of one kind or another.* It has never been suggested that a right is the subject of indirect taxation.

Is there anything else to show that the gift tax is not *indirect?* We may refer back to Chief Justice Fuller's definition in

> Thomas v. United States, 192 U. S. 363-370 (1904),

> "The words, 'duties, imposts and excises' . . . are used comprehensively to cover customs and excise duties, imposed upon importation, consumption, manufacture, and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

Clearly, a gift is not a matter of "importation" or "manufacture"; it has nothing to do with the "consumption . . . of certain commodities," nor with their sale. In this connection, it is well to note Chief Justice Fuller's phraseology: "sale of certain commodities," for the Supreme Court intimated, in Nicol v. Ames, 173 U. S. 509, 521, that a general tax on all sales would be direct:

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale *differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property.* It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

A fortiori, this is true of a tax on gifts.

Making a gift is not any kind of a "business transaction," nor is it a "vocation" or "occupation." The only chance of holding the gift tax to be an excise comes from the *omnium gatherum,* "and the like," but no one would say that a gift is "like" any one of the subjects of indirect taxation mentioned by the Chief Justice.

The District Judge relies upon *Hylton* v. *U. S.,* 3 Dallas 171 (1796). There a tax upon carriages was held indirect. This case was so fully analyzed and considered in the major

opinions in the Pollock cases as to excuse extended comment. If a tax on property is not a direct tax, then a tax on the income from property could not be a direct tax. The carriage tax was sustained by Mr. Justice Chase (p. 175) as a tax on "expense . . . on . . . a consumable commodity." The tax here is not in any sense a tax on an expense.

II. The Tax Is Arbitrary and Unreasonable Because Graduated and Otherwise Lacking in Uniformity.

The tax imposed by the Act of 1924 varies from "1 per centum of the amount of taxable gifts not in excess of $50,000" to "40 per centum of the amount by which the taxable gifts exceed $10,000,000" (Sec. 319). It is, then, a graduated tax. Such a tax is unconstitutional.

The State of Wisconsin imposed a graduated tax upon inheritances, including all transfers *mortis causa*. The Act provided that transfers within six years of the transferor's death were to be conclusively presumed to have been made in contemplation of death. The Statute was held unconstitutional: Schlesinger v. Wisconsin, 270 U. S. 230 (1925), Mr. Justice McReynolds saying, p. 240:

> "Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, They Are Subjected to Graduated Taxes Which Could Not Properly Be Laid On All Gifts or, Indeed, Upon Any Gift Without Testamentary Character."

As applied to gifts, *a graduated excise* is a plain abomination. Graduation is not uniformity; uniformity here means sameness. If a man who owned 100 acres was placed in a different class and taxed at a rate twice as high as his

neighbor owning fifty acres, would he be given the equal protection of the laws?

Myles Salt Co. v. *Iberia Drainage District*, 239 U. S. 478 (1915);

Gast Realty and Investment Co. v. *Schneider Granite Co.*, 240 U. S. 55 (1916);

Cope's Estate, 191 Pa. 1 (1899).

Smith v. Loughman, 245 N.Y. 486, 492, 495 (1927) (Cardozo, C

If a general sales tax were passed taxing only sales over $500, and graduated so as to hit hardest the largest concerns, would such a tax, State or Federal, be valid as "due process" or "equal protection"?

In the case of a sale, the seller who gets the money for goods pays. In the case of a gift, money passes from one owner to another. There is no profit out of which to pay the excise; no change in the general wealth. *But the gift tax taxes part of the remaining capital of the giver in a ratio graduated according to his generosity.*

Moreover, the act discriminates between residents and non-residents. A resident citizen is allowed a general exemption of $50,000. No such exemption is allowed to a non-resident. (Sec. 321.) This is arbitrary. On the other hand there is a discrimination against the resident citizen. He is taxed on all transfers of "property wherever situated," while the non-resident citizen is taxed only on transfers of "property situated within the United States." (Sec. 319.) Thus an American citizen, resident in Europe, may remove all his personal property and give it away and avoid the gift tax; but a resident citizen cannot do this. A resident citizen must pay a gift tax on his transfer of French real estate; a non-resident need not.

In addition the tax makes an arbitrary discrimination based upon the amount of individual gifts. "Gifts the aggregate amount of which to any one person does not exceed $500" per annum are exempt. $51,000 may be equally di-

vided among 102 people without tax. If divided amongst 101 persons, the donor is taxable. The foregoing would seem to be not only unreasonable, but reasonless.

Mr. Attorney-General Olney, in his argument for the United States in the Pollock case, 157 U. S., 504 (1894), said that the word "uniform" might as well be out of the Constitution as in it because "it simply designates and describes an essential element of every tax—an element which is inherent in every valid tax and the absence of which would be sufficient to annul an attempted exercise of the taxing power."

And Mr. Justice Field, in the same case, said, at pp. 595-6:

> "A law containing arbitrary exemptions can in no just sense be termed uniform. . . .
>
> "It (the graduated income tax) thus vitiates, in my judgment, by this arbitrary discrimination, the whole legislation. Hamilton says, in one of his papers (the Continentalist), 'the genius of liberty reprobates everything arbitrary or discretionary in taxation. It exacts that every man, by a definite and general rule, should know what proportion of his property the State demands; whatever liberty we may boast of in theory, it cannot exist in fact while (arbitrary) assessments continue.' 1 Hamilton's Works, Ed. 1885, 270."

Whether the levy be regarded as direct or indirect, then, its imposition violates due process. The same rule as to equality as inherent in the nature of a tax must apply alike to state legislatures and to Congress. *Unreasonable, arbitrary classification violates "due process" quite as much as it violates the equal protection clause.*

This salutary rule applies with equal force to an attempt to graduate so-called "taxes" according to the size of the subject matter irrespective of any difference in nature or quality. If graduated taxes are permitted in general, then legislatures may, through the medium of such taxes, not

only discourage, but in effect prohibit size which comes as the result of success. This may be resorted to as an additional avenue of attack upon big business. Freedom includes the freedom to grow and to be successful and to abound, uninterfered with by taxation proportioned to the extent of success and having the necessary consequence of discouraging and diminishing success.

In *Frost* v. *Corporation Commission of Oklahoma*, Supreme Court, this Court, per Mr. Justice Sutherland, said (Opinion February 18, 1929):

> "The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37. This Court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. *Quaker City Cab Co.* v. *Penna.*, 277 U. S. 389, 400; *Kentucky Co.* v. *Paramount Exch.*, 262 U. S. 544, 550; *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 154. The converse, of course, is equally true.
>
> "A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415; *Air-way Corp* v. *Day*, 266 U. S. 71, 85; *Scheslinger* v. *Wisconsin*, 270 U. S. 230, 240. That is to say, mere difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry.* v. *Ellis*, 165 U. S. 150, 155." *Louisville Gas Co.* v. *Coleman, supra, p.* 37.

A tax graduated according to size is a multiple tax; the additional taxes in the higher brackets are taxes which are not levied upon the *same* thing in the lower brackets. The subject matter is identical, except as to size. The sur taxes are essentially arbitrary, lacking in uniformity, contrary to the very nature of a tax.

While graduated taxes upon incomes and upon estates have been upheld, we submit that judicial sanction should not be given to any further extension. If, as Attorney General Olney said, uniformity is inherent in the nature of a tax, then a classification based solely upon size is arbitrary and capricious. If the principle of permitting graduated taxes is extended, then houses may be taxed at different rates, according to the number of their windows; farms may be taxed at a certain rate on the first hundred acres, and then a step up rate for each succeeding hundred acres; and business may be taxed according to volume at a certain rate on the first million and a step up rate on each succeeding million.

III. Conclusion.

Every new assumption of Federal power contrary to the Constitution is not merely a violation of faith, it is also an aggression against the rights of States and the people thereof.

To give is to exercise an ordinary and indispensable right inherent in property itself. To tax that right is to tax property itself.

It was of the essence of the original compact that the Congress should have no power to levy a direct tax without apportionment. From the point of view of common sense and substance the Congress has violated that compact. If generosity is to be taxed at all, the power is one reserved exclusively to the States. Some subject matters of taxation beside land should be within the exclusive jurisdiction of the States.

Property is of the essence of civilization; the power t
give is of the essence of property; whatever takes away o
taxes that right to give is a direct burden upon propert
qua property. The gift tax is a direct tax.

Respectfully submitted,

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